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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 538

UNITED STEELWORKERS OF AMERICA,
PETITIONER,

vs.

ENTERPRISE WHEEL AND CAR CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 23, 1959
CERTIORARI GRANTED JANUARY 11, 1960

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7851

ENTERPRISE WHEEL AND CAR CORPORATION, a corporation, Defendant Below, Appellant,

v.

UNITED STEELWORKERS OF AMERICA, Plaintiff Below, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

APPENDIX TO BRIEF OF APPELLANT

JUDGMENT OF THE DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STEELWORKERS OF AMERICA,
Plaintiff,

v.

CIVIL ACTION
FILE NO. 895

ENTERPRISE WHEEL AND CAR CORPORATION,
Defendant.

ORDER

By Order of December 11, 1958, this matter having been submitted for decision on the proceedings had herein for Defendant to show cause, and the Court having taken time to consider same, the Court is of the opinion and so finds that Defendant has not shown good cause for its non-compliance with the "Decision and Award of Arbitrator, Milton H. Schmidt," issued upon the arbitration proceedings had between the parties pursuant to the Order of this Court entered October 21, 1957, and which decision and award was annexed as an exhibit to Plaintiff's motion to show cause filed herein; and it is accordingly:

ADJUDGED, ORDERED and DECREED, that the Defendant, Enterprise Wheel and Car Corporation, forthwith comply with the "Decision and Award of Arbitrator, Milton H. Schmidt," issued April 10, 1958, upon the arbitration proceedings had between Plaintiff and Defendant, and in accordance therewith forthwith offer to reinstate, and reinstate each of the grievants involved in said arbitration, namely, William J. Slone, Richard G. Campbell, Fenton Waugh, Everett Freeman, Richard Danford, Everett Perdue, Fred E. Crabtree, Leo Insco, Jr., Ira Noble, Dallas Dalton and Harry Carter, who desire reinstatement to the status of employees with their classification and seniority status as of the date of their discharge on January 18, 1957; and forthwith reimburse said grievants for all time actually lost from work which they would otherwise have had from the Defendant at the regular rate of pay for each grievant, less the ten day suspension period noted in said award, and less such amounts as each has received for other employment since ten days after January 18, 1957; to all of which action of the Court the Defendant objected.

Enter this 16th day of December, 1958.

/s/ HARRY E. WATKINS
United States District Judge

OPINION OF THE DISTRICT COURT

HARRY E. WATKINS, District Judge.

This is an action brought under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. §185, commonly known as the Taft-Hartley Act, regarding a grievance arbitration provision in a collective bargaining agreement which was in effect between the plaintiff union and defendant employer from April 5, 1956, to midnight April 4, 1957. On October 21, 1957, after a full hearing, this Court granted plaintiff's motion for summary judgment and ordered the defendant, pursuant to the terms of the agreement, to submit to arbitration a grievance involving the discharge of eleven employees on January 18, 1957. After the entry of that order, the grievance involved here was submitted by the parties to an umpire or arbitrator, who held hearings and rendered a "Decision and Award." That award, dated April 10, 1958, requires defendant to reinstate the aggrieved employees to their position of January 18, 1957, and further awards reimbursement of wages for all time lost because of their wrongful discharge, with the exception of a 10-day suspension period, less such amounts received for other employment since 10 days after January 18, 1957. Defendant has refused to abide by the award and, in this same action, upon the motion of the plaintiff, the Court has ordered defendant to show cause why it has not complied with the arbitrator's decision. Defendant has filed an answer setting forth its position, and after the filing of extensive briefs and oral argument, the matter has been submitted for decision.

Defendant urges first that this Court is without jurisdiction to act upon plaintiff's motion to show cause, now that the arbitrator has rendered his decision, because the motion seeks to enforce an award which defendant reads as being uniquely personal to the individual grievants, under the rationale of Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 1955, 348 U.S. 437, 75 S. Ct. 488, 99 L. Ed. 510. That case did not involve an arbitration provision, but held that a union had no standing to initiate an action in federal court for unpaid wages allegedly due under the provisions of a collective-bargaining contract to some 4,000 employees represented by the union. In three separate opinions, the majority of the Supreme Court held that §301 of the Taft-Hartley Act does not authorize suits by unions for uniquely personal rights of the individual employees such as compensation.

The decision of this Court leading to the entry of the order of October 21, 1957, compelling arbitration, was based on three Supreme Court decisions handed down in June, 1957. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S. Ct. 923, 1 L. Ed. 2d 972; General Electric Company v. Local 205, United Electrical, Radio and Machine Workers of America, 353 U.S. 545, 77 S. Ct. 921, 1 L. Ed. 2d 1028; and Goodall-Sanford, Inc. v. United Textile Workers of America, 353 U.S. 550, 77 S. Ct. 920, 1 L. Ed. 2d 1031. Those cases held that United States District Courts are given jurisdiction by §301 of the Taft-Hartley Act to decree specific performance of an agreement to arbitrate all grievances, when that agreement is contained in a collective-bargaining con-

tract. Plaintiff urges here that it is manifestly a part of this Court's power, under those cases, to require acquiescence in the decision of the arbitrator, once the Court has ordered a party to such a collective-bargaining agreement to submit a grievance to arbitration.

Defendant points to one case from a district court which held that notwithstanding the Lincoln Mills, General Electric, and Goodall-Sanford cases of 1957, the Westinghouse case of 1955 prevents a union from bringing an action in district court to enforce an arbitrator's award. Textile Workers Union of America v. Cone Mills Corp., October 17, 1958, D.C.M.D.N.C., ...F. Supp....., 27 L.W. 2196. But defendant admits that there is a split of authority on this point, for the case of Amalgamated Clothing Workers of America v. A. L. Kornman Co., December 17, 1957, D.C.M.D. Tenn., ... F. Supp....., 33 CCH Labor Cases, par. 71,166, held that a district court has jurisdiction under §301 of the Taft-Hartley Act to enforce an arbitrator's award, despite the holding of the Westinghouse case, under the authority of the Lincoln Mills and companion decisions. These district court cases, Cone Mills and Kornman, are not in point here, however, because in both instances the parties had voluntarily submitted the grievance to arbitration (apparently in accordance with provisions of collective-bargaining contracts) before any action was brought in the district court. In the case at bar, on the other hand, there was no voluntary submission of a grievance to arbitration, but rather defendant only submitted the problem to arbitration after an order of this Court required it to do so.

It may well be that once an arbitration award has been made pursuant to a voluntary submission by the parties to arbitration which finally determines the rights of the parties to a grievance, particularly in situations like that in the Cone Mills case, supra, where the award concerned itself only with wages due individuals in the form of vacation payments or unemployment benefits, the union has no standing to sue, but rather the affected individuals must press their personal claims. I do not need to decide that question here, for that is not our case, although it is interesting to note that here the case is being prosecuted by the union primarily to obtain reinstatement of the workers with the monetary award a secondary consideration, and since at the time this grievance began the plaintiff union was the exclusive bargaining agent of the affected employees, the plaintiff might have enough interest in the action to bring suit even if the arbitration award were the result of voluntary submission to arbitration.

But it must be kept in mind that this action was originally brought to compel defendant to submit the grievance to arbitration, and this Court ordered the defendant to

> "within 35 days from the date hereof, commence specific performance of Step Four of Article III of the agreement between Enterprise Wheel and Car Corporation and the United Steelworkers of America, dated April 4, 1956, and to expeditiously proceed with the procedure therein set forth, * * * ."

Having partially complied with that order, it is too late for defendant to now urge that this Court has

no jurisdiction to compel defendant to go through with arbitration. It would certainly be unfair to allow a party to go step by step through the process of arbitration, only to ignore the decision when it turns out unfavorable to that party.

As quoted above, this Court ordered defendant to proceed with the arbitration procedure of Step Four of Article III. Defendant complied with (or the parties waived) all the provisions of Step Four except the vital last sentence, which reads: "The decision of the umpire shall be final and binding on the parties." I conclude that it was inherently a part of the order of October 21, 1957, that defendant accept as final and binding the decision of the umpire, or arbitrator. To hold otherwise would have the order requiring a futile act. As stated in the recent case of Item Company v. New Orleans Newspaper Guild, 5 Cir., 256 F. 2d 855, 856, decided June 26, 1958, the Supreme Court recognized in the Lincoln Mills and companion cases that §301 of the Taft-Hartley Act created a new area of federal substantive law and "* * * declared that in this new field of law, rules are to be devised by the federal courts to determine enforceability of collective-bargaining-contract clauses for arbitration of disputes arising 'between an employer and a labor organization'." In arriving at the rules to be applied by the courts in this regard, certainly Congress did not intend that federal courts should have the power to require employers and unions to submit their differences to arbitration, but those same courts should have no power to see that the parties accept the arbitrator's decision. The Lincoln Mills case found a Congressional policy favoring the peaceful settlement of labor disputes by

the use of arbitration, and I think it completely consonant with that policy to hold that once this Court has compelled arbitration the Court has power to see that its order is fully carried out.

I therefore reject defendant's contention that this Court is without jurisdiction because personal rights of individuals are affected. This Court had jurisdiction, under §301 as interpreted by the Lincoln Mills case, of this action when it originated because a union controversy was involved. The union and the employer were the only parties to the collective-bargaining contract which this Court ordered specifically performed with regard to arbitration. The arbitrator's award is entitled, "In the Matter of Arbitration Between Enterprise Wheel and Car Corporation and United Steelworkers of America, AFL-CIO, Local Union No. 4513." Defendant has not carried out all the acts required of it by the order of October 21, 1957. I think it is quite clear, under all the circumstances, that this Court continues to have jurisdiction of this controversy between the union and the employer.

Defendant's second jurisdictional defense is equally groundless. It is contended that the order of October 21, 1957, has been compiled with and the case has been finally concluded. But as discussed previously, the only fair interpretation which can be placed upon the order is that it requires defendant to proceed through *all* the process of arbitration as set forth in Step Four of the contract, including acceptance of the arbitrator's award.

That does not mean that the arbitrator must necessarily have gone through the accounting process

of computing precisely how much back pay each aggrieved employee is entitled to receive, or how much must be deducted by reason of wages earned elsewhere during the period these employees were wrongfully deprived of employment. A good faith compliance with the award by both parties eliminates the necessity of the arbitrator considering such petty, ministerial computations. The award requires the defendant to reimburse certain employees for

> "all time actually lost from work which they would otherwise have had from the Company at the regular rate of pay for each grievant, less the ten day suspension period and less such amounts as each has received for other employment since ten days after January 18, 1957."

The award is quite specific, and I find no merit in defendant's argument that it is so incomplete or imperfect that it does not constitute a final and definite award.

Defendant strongly urges that the arbitrator exceeded his authority in this case when he ordered reinstatement and back pay to the eleven grievants extending past April 4, 1957, which was the termination date of the contract. Defendant cites authorities such as Williston on Contracts (1937 ed.) Sec. 1359, p. 3815; United Protective Workers Local No. 2 v. Ford Motor Co., 7 Cir., 223 F. 2d 49; O'Dell v. Humble Oil & Refining Co., 10 Cir., 201 F. 2d 123, and several older cases, for the proposition that damages for wrongful discharge under a collective-bargaining contract are limited to the period with the earliest date on which the employee could lawfully be discharged.

Defendant reasons that on the day this contract expired, the defendant could have discharged these employees and not be subjected to damages for the discharge, and that, therefore, no award can properly be made granting back pay or reinstatement past that date when defendant could lawfully have discharged these workers. An investigation of all the cases cited, however, reveals that in each of them the discharged employees accepted the termination of their employment and sued for damages for the wrongful discharge without seeking reinstatement.

In the case at bar, if any or all of the eleven employees would have accepted their discharge as final and chosen to sue their employer for wrongful discharge, then these cases cited by the defendant might apply and if the discharge were found to be wrongful the employee would be limited in his measure of damages to back pay from the date of discharge to the expiration date of the contract. In this instance, however, the eleven employees have not accepted their discharge as final, but the union has used the grievance-arbitration mechanism of the collective-bargaining contract to gain reinstatement of the wrongfully-discharged employees. The Court is informed that the men involved here are somewhat elderly men, to whom seniority is of utmost importance and to whom back wages are only a comparatively incidental factor. The reinstatement is the moving factor of the union's interest and right in this case.

To allow the defendant to only reimburse the employees up until April 4, 1957, would be to allow the defendant to profit unfairly from its own wrongdoing.

If the men had not been unjustly discharged, it must be assumed that their employment would have continued to date; until reinstated, these employees continue to suffer loss of wages by virtue of the defendant's improper action irrespective of any expiration of the contract. This same point was raised in Western Union Division, Commercial Telegraphers Union v. Western Union Telegraph Co., 83 N.L.R.B. Reports 238, where the employer was prohibited by Sec. 222 (f) (7) of the Merger Act (Communications Act of 1934, as amended) from furloughing employees within four years of its merger with Postal Telegraph. The company furloughed an employee within the four-year period, illegally. The full National Labor Relations Board ordered reinstatement and back pay for the employee, even though the four years had passed by the time the Board handed down its decision. The Board stated:

> "In this case, Hepp's loss, after the 4-year period, of the job held by him before his furlough, with the consequent loss of wages, is a direct result of the Respondent's wrongful conduct, unless it be assumed that the Respondent would have furloughed him immediately upon the expiration of that period. Such an assumption would be wholly speculative on the present record and is one, therefore, in which we are unwilling to indulge.
>
> "Under these circumstances, we conclude that the remedy recommended by the Trial Examiner, *viz.*, reinstatement and back pay until reinstatement is offered, is appropriate * * * "

And in Victor Metal Products Corp. of Delaware, 106 N.L.R.B. Reports 1361, an employee was found to have been unlawfully discharged by her employer on January 23, 1953. The union's contract expired March 15, 1953, and the employee was reinstated May 4, 1953. The Board found that the union had caused the wrongful discharge, and ordered back pay to be assessed against the union. The union contended it was not liable for any back pay after the expiration of its contract, but the Board held:

> "The purpose of the Board's remedial orders is not punitive, but to restore the situation 'as nearly as possible, to that which would have obtained but for the illegal discrimination.' As a result of the Respondent Union's unlawful conduct, Bedima [the employee] suffered a loss of wages from January 23, 1953 to May 4, 1953. The Trial Examiner's recommended order merely requires the Union to make her whole for this loss—in other words, to restore Bidema to the situation which would have obtained but for the illegal discrimination practiced against her.
>
> "It is true that the Union's collective-bargaining contract with the Employer ended on March 15, 1953. But this did not alter the fact that the Union had unlawfully caused the Employer to discharge Bidema and that the loss of wages suffered by her from March 15 to May 4 resulted from that unlawful act. * * * As between the victim of the unlawful conduct and the wrongdoer, we believe that the loss suffered by the former should equitably be borne by the latter."

If defendant here had utilized the grievance machinery contained in the collective-bargaining agreement,

without undue delay occasioned by its refusal to arbitrate and its refusal to accept the arbitrator's decision, these employees could probably have been reinstated before the contract expired. The protagonist in the delay in settling the dispute of January 18, 1957, has been the defendant, who cannot now complain of the nearly 23 months of back pay awarded the employees who were improperly discharged. I find that the arbitrator did not exceed his authority under the contract in this case.

I conclude that this Court has jurisdiction over this matter, under §301 of the Taft-Hartley Act; that the plaintiff union has a standing in this Court to see that the arbitration agreement to which it is a party is carried to fruition; and the Court having once taken jurisdiction should dispose of all questions arising in the case, particularly since to dismiss this action would result either in a multiplicity of suits by individual employees or a failure of justice altogether. The Lincoln Mills case establishes that the substantive law in cases of this type is to be fashioned by federal courts from the policy of our national labor laws, and "The range of judicial inventiveness will be determined by the nature of the problem." 353 U. S. at page 457. It would appear that requiring the defendant here to comply with the arbitrator's findings appropriately and logically follows the teaching of the Lincoln Mills case. The arbitrator's decision requiring defendant to reinstate employees and reimburse them for back pay past the termination date of the contract is in keeping with the policy of our labor laws under the National Labor Relations Board cases cited earlier. It is therefore the ruling of this Court that defendant

corporation must promptly abide by the valid, complete and binding decision and award made by the arbitrator; that this is a part of the specific performance ordered by this Court on October 21, 1957; and that plaintiff is now entitled to further relief in this case in the form of an additional order specifically compelling defendant to forthwith accept and abide by the final decision and award of the arbitrator.

Counsel may prepare an appropriate order in accordance with the views expressed in this opinion.

ORDER ENTERED OCTOBER 21, 1957 COMPELLING SUBMISSION TO ARBITRATION

On the 15th and 16th days of October, 1957, came the plaintiff by James P. Clowes and Carney M. Layne, its counsel, and came the defendant by E. A. Marshall, its counsel, and this cause came on for hearing on plaintiff's motion for summary judgment with affidavit attached, at the commencement of which hearing defendant tendered in open Court the affidavit of E. A. Marshall, which is ordered filed, and thereupon plaintiff tendered the affidavit of Harold Johnson which is likewise ordered filed; whereupon the matter was argued by counsel, and the Court having considered the motion, the pleadings and both plaintiff's and defendant's affidavits on file, and being fully advised in the premises, it is of opinion that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law, and it is:

ADJUDGED, ORDERED, and DECREED that plaintiff's motion for summary judgment be, and the same is, hereby sustained, and that costs be assessed against the defendant, and that the defendant, Enterprise Wheel and Car Corporation, within 35 days from the date hereof, commence specific performance of Step Four of Article III of the agreement between Enterprise Wheel and Car Corporation and the United Steelworkers of America, dated April 4, 1956, and to expeditiously proceed with the procedure therein set forth, to which action by the Court the defendant objected and excepted.

/s/ HARRY E. WATKINS
United States District Judge

EXCERPTS FROM THE COLLECTIVE BARGAINING AGREEMENT BETWEEN ENTERPRISE AND THE UNION DATED APRIL 5, 1946 [Exhibit A to the Complaint]

ARTICLE III. *Adjustment of Grievances:*

Section 1. Should differences arise between the Company and the Union, or its members employed by the Company as to the meaning and application of the provisions of this Agreement, an earnest effort shall be made to settle such differences immediately, in the following manner:

* * *

Step 4. In the event that the dispute shall not have been satisfactorily settled in accordance with the above, it shall be submitted, at the request of either party, to a panel of three (3) members, one of whom shall be appointed by the Union, one by the Company and the third member, who shall be an impartial umpire, shall be selected by mutual agreement of the parties. The expenses and salary incident to the services of the umpire shall be paid jointly by the Union and the Company. In the event that a mutually agreeable umpire cannot be selected within ten (10) days after date of notice of desire to appeal to 4th step grievance, either party may request the Federal Mediation and Conciliation Service to furnish the Company and the Union with a list of five (5) qualified and disinterested arbiters. The Company and the Union shall each reject two of the names thus submitted and the remaining person (or either

of the remaining persons) shall be the third member of the panel. The decision of the umpire shall be final and binding on the parties.

* * *

ARTICLE IV. *Suspension and Discharge:*

Section 1. In the exercise of its rights and duties as set forth in ARTICLE VIII, Management agrees that a member of the Union shall not be peremptorily discharged from and after the date hereof, but that in all instances in which Management may conclude that an employee's conduct, may justify suspension or discharge, he shall be first suspended. Such initial suspension shall be for not more than five (5) work days. During this period of initial suspension the employee may, if he believes he has been unjustly dealt with, request a hearing and a statement of the offense before the Plant Manager with a member or members of the Grievance Committee present as he may choose. At such hearing, all the facts concerning the case shall be made available to both parties. After such hearing, Management shall conclude whether to convert the suspension into discharge, or extend, sustain, or revoke the suspension. If the suspension is revoked the employee shall be returned to employment and receive full compensation at his regular rate of pay for the time lost. If the suspension is sustained, extended, or converted into discharge, the employee may at any time within five (5) working days from the filing of Management's decision, allege and present a grievance to be handled in accordance with the procedure of ARTICLE III.

Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost.

* * *

ARTICLE XV. *Duration and Renewal:*

Section 1. The Company and the Union mutually agree that the terms and conditions of this Agreement shall be in full force and effect from April 5, 1956 until Midnight on April 4, 1957.

AWARD OF THE ARBITRATOR, FROM EXHIBIT A OF PLAINTIFF'S MOTION FOR DEFENDANT TO SHOW CAUSE

The grievance is allowed as follows:

1. The discharge of each of the grievants which occurred on January 18, 1957, is set aside and reduced to a disciplinary penalty of ten days suspension for each of the grievants. The ten day period is to be calculated from January 18, 1957.

2. The Company shall reinstate each of the grievants who desire reinstatement to the status of employees with their classifications and seniority status as of the date of their discharge, January 18, 1957.

3. The Company shall reimburse the grievants for all time actually lost from work which they would otherwise have had from the Company at the regular rate of pay for each grievant, less the ten day suspension period and less such amounts as each has received for other employment since ten days after January 18, 1957.

/s/ Milton H. Schmidt

AFFIDAVIT OF OSCAR KRAHENBUEHL IN SUPPORT OF DEFENDANT'S ANSWER AND RESISTANCE TO PLAINTIFF'S MOTION FOR DEFENDANT TO SHOW CAUSE; ALSO TAKEN AND TREATED AS A PART OF THE ANSWER TO THE ORDER TO SHOW CAUSE.

STATE OF WEST VIRGINIA

COUNTY OF CABELL, TO-WIT:

This day personally appeared before me, the undersigned authority OSCAR KRAHENBUEHL who, being by me first duly sworn, deposes and says that he is President of Enterprise Wheel and Car Corporation, the defendant named in that certain motion to show cause filed by United Steel Workers of America, as plaintiff in the above captioned action; that he has been President of that corporation for approximately eight years; that said corporation entered into a contract on April 5, 1956 expiring on April 4, 1957, with the plaintiff Union; that said contract is the same contract under which the United States District Court for the Southern District of West Virginia by order of October 21, 1957 in the above captioned action ordered the corporation to comply with the arbitration procedure of Step 4, Article III therein; that in accordance with said court order said grievances ordered by the court to be arbitrated were submitted by the Union and the corporation to Milton H. Schmidt for arbitration under the terms and conditions of the contract aforesaid; that hearing was held before said arbitrator on January 3, 1958; that on April 10, 1958 the arbitrator rendered

what he called "Decision and Award of Arbitrator, Milton H. Schmidt"; that the corporation has not satisfied said award because it is illegal and void; that notwithstanding that the decision and award are void and would apparently grant reinstatement of the grievants involved with back pay at their regular rate, less amounts as received from other employment not only for ten days after January 28, 1957 (the date of the end of a ten-day suspension period imposed by the arbitrator) to April 4, 1957, but on into the future beyond the contract termination date; the corporation, nevertheless, while refusing reinstatement, offered to pay the grievants at their regular rate of pay for their actual losses from the end of the ten-day suspension period on January 28, 1957 to April 4, 1957, the contract termination date, but said offer was refused by the Union.

Affiant further says that since April 4, 1957, the contract termination date, the employees of the corporation have worked without, and are still working without, any contract or agreement whatsoever; that the terms of the terminated contract have not been extended beyond April 4, 1957, and no new collective bargaining contract has been negotiated.

/s/ OSCAR KRAEHENBUEHL

Taken, subscribed and sworn to before the undersigned authority this 8th day of December, 1958.

My commission expires July 19, 1961.

/s/ DORA SCHWEICKERT
Notary Public, Cabell County,
West Virginia

EXCERPTS FROM THE TRANSCRIPT OF DECEMBER 11, 1958

Colloquy between Court and Union Counsel

Page 15:

* * *

THE COURT: Now, don't tell me what I have already decided. I will decide what I have already decided, but I am thinking of this. It seems to me that your theory of the case is not based upon any oral agreement that was in effect or whether the men worked under any later oral agreement or not, and they are not basing—as I understand their contention—on any fact—admittedly there was no written agreement—you did not contend that this other agreement continued beyond April of 1957, as I understand you.

MR. CLOWES: No, sir, the old agreement did not.

Pages 32-34:

THE COURT: Let me ask you this, you take the position then that the company's way of getting out of this dilemma is to first reinstate him, the contract is ended, you don't contest the fact that the company could discharge him the day they reinstate him?

MR. CLOWES: No, sir, I do not.

THE COURT: Because there is no contract.

MR. CLOWES: I won't go to that extent. There is no written contract. If they would fire a man for something apart from this particular situation right here after they have reinstated, that is entirely a different matter unrelated to this in any way. They can't discriminate under National Labor Relations Act or cause any wrongful discharge.

THE COURT: Of course, that's a different proposition.

MR. CLOWES: Yes, sir, that's a different proposition.

THE COURT: But certainly the existing contract would have been terminated—I mean the written contract that they had before would certainly be ended and under the provisions of that contract he would have no right to continue, would he?

MR. CLOWES: If he didn't fall within the provision of a new contract the company would then have the right to hire, fire and do anything.

THE COURT: That is what I mean.

MR. CLOWES: Yes, sir.

* * *